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August 25, 2014

Via Hand Delivery

Marlene H. Dortch, Secretary Federal Communications Commission 445 12th Street, SW, Room TW-A325 Washington, DC 20554

Re: In the Matter of Application of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations-MB Docket No. 14-57

Dear Secretary Dortch,

On behalf of RCN Telecom Services, LLC, Grande Communications Networks, LLC and Choice Cable TV of Puerto Rico, collectively, ("Joint Commenters"), enclosed is one (1) copy of the **REDACTED** version of the Joint Commenters Petition to Deny Applications or Condition Consent for association with the above referenced proceeding.

In accordance with the Protective Orders issued in this proceeding, all pages of this filing are marked "**REDACTED - FOR PUBLIC INSPECTION**".

Please date-stamp and return the enclosed extra copy of this transmittal.

Sincerely,

/s/ Joshua M. Bobeck

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¹ Application of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 14-57, Joint Protective Order, DA 14-463 ("Joint Protective Order").

Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of)	
Applications of)	MB Docket No. 14-57
Comcast Corp. and Time Warner Cable Inc.)	
For Consent To Assign or Transfer Control of Licenses and Authorizations)	

RCN TELECOM SERVICES, LLC GRANDE COMMUNICATIONS NETWORKS, LLC, AND CHOICE CABLE TV OF PUERTO RICO ("JOINT COMMENTERS") PETITION TO DENY APPLICATIONS OR CONDITION CONSENT

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SUMMARY

RCN Telecom Services, LLC ("RCN") and Grande Communications Networks, LLC ("Grande") provide bundles of video and broadband in competition with Applicants Comcast Corporation ("Comcast") and Time Warner Cable Inc. ("TWC"). In many instances RCN's ability to compete with Comcast is hindered by Comcast's anticompetitive practices. If the proposed combination with Time Warner Cable ("TWC") is approved it is likely that Comcast will extend those practices to the TWC markets it retains post-merger. The proposed merger between Comcast and TWC cable will create a cable colossus that will pose myriad harms to competition from actual or potential MVPD competitors in numerous ways.

The combined company will have significant monopsony power in the market for access to video programming, thereby enjoying discounts far in excess of those available to its competitors. These discounts make it far more costly for competitors to offer similar packages of content. In addition, the proposed combination of Comcast's NBCU programming with TWC's footprint may be expected to create additional vertical harms, as Comcast already imposes significant conditions on access to NBCU programming by competitive video providers that renders competitors' offerings less competitive. The proposed merger poses the threat that these anticompetitive conditions will be extend to markets where RCN and Grande compete with TWC.

The proposed combination of Comcast, the nation's largest cable operator with approximately 22 million cable subscribers and 21 million broadband customers, and the second largest cable operator, TWC, with approximately 11 million cable subscribers and almost 12 million broadband customers, further poses harm to the public interest despite the fact that the two companies do not directly compete in the MVPD market. The post-merger entity's larger footprint allows the combined company to capture more of the benefit of its exclusionary and

anticompetitive conduct and provides a natural incentive for the company to engage in additional anti-competitive conduct.

The proposed combination of Comcast and TWC further creates additional harms in the broadband Internet access market, where the combined company's scope and scale will afford it significant influence over the market for broadband gear, installation and construction. This will provide the merged company the power to insist on exclusive contracts aimed at foreclosing competitors such as RCN and Grande from accessing state-of-the-art technology and delaying their ability to deploy network facilities in competition with the merged company.

Further, the merged Comcast/TWC poses a serious threat to competition in the spot cable advertising market where Comcast and TWC control the largest and second largest representation companies and control the vast majority of the consortia that control regional spot advertising. The combination of Comcast's and TWC's spot cable advertising operations threatens to harm competition in the MVPD market by reducing advertising revenue available to competitive MVPDs such as RCN and Grande and also harm to the broader public by raising the rates for spot advertising which advertisers must then pass on to the public through higher prices for the goods and services they sell to the public.

Finally, the merged company will have an increased ability and incentive to exclusive contracts to deny RCN, Grande and other small competitors' access to local and national sales, installation, construction and field collections contractors. This will raise the costs for rival MVPDs as well as cause delays in bringing services to the public.

To prevent these harms, the Commission should deny the application or condition grant of the application on imposition of conditions that alleviate these harms by requiring the merged Comcast/TWC to:

- Extend Comcast/NBCU programming conditions from the Comcast/NBCU order to TWC properties, increase length of conditions to 10 years; modify the arbitration process to make it more effective, allow programming cooperatives to represent MVPDs and eliminate loopholes.
- Require Comcast/TWC to provide access to their major market advertising sales cooperatives on the same terms available to Comcast/TWC.
- Prohibit Comcast/TWC from entering exclusive contracts with contractors, vendors, and equipment manufacturers
- Require access to emerging technology and equipment on reasonable rates, terms and conditions, and prohibit the combined entity from raising rivals' costs by requiring third party hardware and software providers to offer emerging technology and equipment to MVPDs only on discriminatory terms.

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Before the Federal Communications Commission Washington, D.C. 20554

In the Matter of)	
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Applications of)	MB Docket No. 14-57
Comcast Corp. and)	
Time Warner Cable Inc.)	
)	
For Consent To Assign or Transfer Control of)	
Licenses and Authorizations)	

RCN TELECOM SERVICES, LLC GRANDE COMMUNICATIONS NETWORKS, LLC, AND CHOICE CABLE TV OF PUERTO RICO PETITION TO DENY APPLICATIONS OR CONDITION CONSENT

RCN Telecom Services, LLC ("RCN"), Grande Communications Networks, LLC ("Grande") and Choice Cable TV of Puerto Rico ("Choice Cable") (collectively, Joint Commenters), hereby jointly petition the Commission to deny the Applications of Comcast Corporation ("Comcast") and Time Warner Cable Inc. ("TWC") for Consent to Transfer Control of Licenses and Authorizations, 1 on the ground that the Applicants have failed to meet their burden of showing that the proposed transfers will serve the public interest, convenience and necessity. 2 In the alternative, Joint Commenters respectfully urge the Commission to adopt safeguarding conditions in connection with the proposed transfers to protect the public interest and preserve and promote competition in the market.

¹ Application of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 14-57 (filed Apr. 8, 2014) ("Application").

I. Introduction

RCN, the nation's first and one of the largest cable overbuilders, provides customers with multichannel video programming, wired telephony, and wired high-speed Internet access services over fiber-based facilities, entirely owned and operated by RCN. RCN provides these services in the Chicago, Boston, New York City, Philadelphia, Lehigh Valley, and Washington, D.C. markets. RCN competes head-to-head in the provision of one or more of those services with TWC in New York City and with Comcast in Chicago, Boston, Philadelphia, and Washington, D.C. RCN has approximately 440,000 customers.

Grande provides multichannel video programming, wired telephony, and wired high-speed Internet access services to Texas customers in North Dallas, San Antonio/San Marcus/Austin, Waco, Corpus Christi, and Midland/Odessa. Grande competes with TWC in each of these markets except Midland/Odessa. Grande has approximately 150,000 customers. Both Grande and RCN compete with existing cable providers, principally in bundled service offerings as opposed to stand-alone services.

Choice Cable is one of two incumbent cable operators in Puerto Rico. It provides tripleplay services to the southern and western portion of Puerto Rico. It has approximately 115,000 customers.

II. Legal Framework

Under Sections 214 and 310(d) of the Communications Act, the Commission is bound to evaluate whether "the proposed transfers of control of licenses and authorizations ... will serve the public interest, convenience and necessity." In this analysis the Commission considers

² 47 U.S.C. §§214, 310.

³ Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and Subsidiaries, Debtors-In-Possession), Assignors, to

whether the "transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes." The Commission accordingly weighs "any potential public interest harms …against any potential public interest benefits." The Applicants have the burden "of proving, by a preponderance of the evidence, that the proposed transaction on balance, serves the public interest."

The public interest standard incorporates a "deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest." Contrary to these objectives, this acquisition will not preserve or enhance competition or promote a diversity of license holdings, but will instead increase and enhance TWC/Comcast's dominance in the multichannel video programming distributor ("MVPD") and broadband market.

The Commission's "competitive analysis ... forms an important part of the public interest evaluation" in its merger review and "is informed by but is not limited to traditional antitrust principles." The Commission must, however, also consider "whether the transaction will

Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8217 ¶ 23 (2006) ("Adelphia Order").

⁴ Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, 26 FCC Rcd 4238, 4247 ¶ 22 (2011) ("Comcast/NBCU Order"); Adelphia Order, 21 FCC Rcd at 8217 ¶ 23.

 $^{^{5}}$ Comcast/NBCU Order, 26 FCC Rcd at 4247 \P 22; Adelphia Order, 21 FCC Rcd at 8217 \P 23.

 $^{^{6}}$ Id..

 $^{^{\}frac{7}{2}}$ Comcast/NBCU Order, 26 FCC Rcd at 4248 \P 23; Adelphia Order, 21 FCC Rcd at 8218 \P 24.

⁸ *Comcast/NBCU Order*, 26 FCC Rcd at 4248 \P 24.

accelerate the decline of market power by dominant firms in the relevant communications markets and the transaction's effect on future competition." Under this competitive analysis, "the Commission considers whether a transaction will enhance, rather than merely preserve, existing competition."

Further, if the Commission finds certain aspects of the proposed transaction harmful to the public interest, its broad authority under the public interest standard authorizes it to "impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served." Unlike merger reviews conducted by the government's antitrust agencies, the Commission's "public interest authority enables it to rely upon its extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits." 12

The Commission's competitive analysis requires an examination of the Applicants' existing market power and the impact of the merger on that market power. Market power is typically defined as a firm's ability to exclude competition or control prices.¹³ Precedent makes clear that the assessment of whether an incumbent has market power does not rest solely on

⁹ *Adelphia Order*, 21 FCC Rcd at 8218-19 ¶ 25.

 $[\]frac{10}{}$ *Id.*

¹¹ Adelphia Order, 21 FCC Rcd at 8219 ¶ 26 (citing Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21545 ¶ 43 (2004)).

 $[\]frac{12}{}$ *Id*.

 $^{^{13}}$ See Comcast/NBCU Order, 26 FCC Rcd at 4251 ¶ 29 n.62 (citing DOJ/FTC Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission, (Apr. 2, 1992, revised Apr. 8, 1997) ("Horizontal Merger Guidelines")); see also United States v. E.I. duPont Nemours & Co., 351 U.S. 377, 391 (1956).

market share, although high market share can be indicative of market power. ¹⁴ Antitrust jurisprudence has, however, long established that high market share alone is enough to indicate the existence of monopoly power. ¹⁵ The courts have long held that a high market share demonstrates monopoly power. ¹⁶ Nonetheless, the Commission "has never viewed market share as an essential factor."

The Commission's market power analysis begins "by defining the relevant product markets and relevant geographic markets ... next identify[ing] market participants and examin[ing] market concentration ... [and] whether entry conditions are such that new competitors could likely enter and defeat any attempted post-merger price increases." [18]

III. Overbuilders Increase Consumer Welfare

As an initial matter, competition from facilities-based wireline MVPDs or overbuilders (also referred to as broadband service providers ("BSPs")) such as RCN and Grande has provided the only true check on cable prices, customer care, and service quality. While DBS has held a fairly constant market share *vis a vis* cable, DBS simply cannot match the "triple play"

¹⁴ See United States v. General Dynamics, 415 U.S. 486, 498, (1974); see also AT&T v. FCC, 236 F.3d 729, 736 (D.C. Cir. 2001).

United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (holding that the existence of monopoly "power ordinarily may be inferred from the predominant share of the market" and that the fact that one participant in the market held a market share of 87% left "no doubt" that it possessed "monopoly power.").

¹⁶ See Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481 (1992) (80% market share established monopoly power); Weiss v. York Hospital, 745 F.2d 786, 827 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985) (market share of 80% was sufficient to establish monopoly power); American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946) (over two-thirds of the market is a monopoly);

 $[\]frac{17}{4}$ AT&T v. FCC, 236 F.3d at 729.

 $^{^{18}}$ SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18304 ¶ 21 (2005) ("SBC/AT&T Merger Order").

services that Comcast, TWC, and most overbuilders provide. Studies have shown the consumer benefits provided by wireline competition to incumbent cable operators, particularly competition from overbuilders that offer bundled video, local telephone and high-speed Internet access. In particular, the U.S. General Accounting Office ("GAO") released a report finding that:

On the basis of the 12 markets we examined, it appears that BSPs' entry into a market benefited consumers in the form of lower prices for subscription television, high-speed Internet access, and local telephone services. Incumbent cable operators often responded to BSP entry by lowering prices, enhancing the services that they provide, and improving customer service. ... The combined effect of BSP entry and incumbent companies' response provides significant benefits for consumers. The rates for telecommunications services were generally lower in 6 markets with BSPs than in the 6 markets without a BSP. For example, expanded basic cable television rates were 15 to 41 percent lower in 5 of the 6 markets with a BSP when compared to their matched [demographically comparable] market [without a BSP]. ¹⁹

The Commission's own findings likewise demonstrate that the presence of an overbuilder or additional competitor in the market acts as a check on cable rates. The most recent annual report on cable industry prices, for example, reported a 3.0% differential between competitive and noncompetitive areas for basic service. Several annual reports on video programming delivery competition acknowledge cable company responses to head-to-head competition include lower prices and additional new services, among others. ²¹

¹⁹ U.S. Government Accounting Office, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, U.S. Senate, *Wire-Based Competition Benefited Consumers in Selected Markets*, February 2004, at 4 ("2004 GAO Report"). *See also, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Report, 24 FCC Rcd 542 at ¶103 (2009) (*citing* 2004 GAO Report).

²⁰ Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices, 28 FCC Rcd 9857 at ¶ 15 (2013).

²¹ See e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Report, 20 FCC Rcd 2755 at ¶ 74 (2005); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Report, 20 FCC Rcd 1606 at ¶ 83 (2004); Annual Assessment of the Status of Competition

Moreover, the presence of overbuilders has spurred the deployment of advanced services as more consumers choose to subscribe to bundled services that often include broadband. On average in 2006, more than 32% of BSP customers subscribed to video, voice, and data services and some BSPs had more than 50% of its customers take all three services. ²² Today, approximately 85% of RCN customers and approximately 77% of Grande customers subscribe to bundled service offerings that include both video and broadband.

The Commission must deny or condition the Comcast and TWC combination to ensure that overbuilders can continue to provide consumers the robust competition to the incumbent cable operators needed to benefit consumers and the public interest with more customer choice, better service, and more value. Otherwise, as the staff of the New York State Department of Public Service recently stated, "[t]he combined company would be able to exercise its increased capital and financial resources to discourage new entries into [telephone and broadband service] markets, stifling technological innovation and further competition, while keeping prices artificially high."²³

IV. The Proposed Merger Will Harm Competition and Consumers

The proposed merger will create a cable giant that is far larger than any cable company that has ever existed. It threatens harm to actual or potential MVPD competitors in multiple ways, including abuse of the merged company's power in access to programming at fair cost, broadband internet access, cable advertising, vendor and contractor access, and industry

in the Market for the Delivery of Video Programming, Eighth Report, 17 FCC Rcd 1244 at ¶ 197 (2002).

Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Report, 24 FCC Rcd 542 at \P 102 (2009).

²³ See Joint Petition of Time Warner Cable, Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control, NYS Dept. of Public Service Staff Comments, NYPSC Case 14-M-0183, p. 36 (filed Aug. 8, 2014) ("NYS DPS Comments").

technology. It also threatens harm to competing suppliers in many of these markets.

A. Combination of Two Largest Cable Companies

Market share is an important component of the Commission's market power analysis because it examines the level of concentration in a market, and "concentration in the relevant markets is one indicator" of the potential for anti-competitive conditions. $\frac{24}{}$

Comcast is the largest cable operator in the U.S. with approximately 22 million cable subscribers and 21 million broadband customers.²⁵ TWC is the second largest cable operator with approximately 11 million cable subscribers and almost 12 million broadband customers.²⁶ Together, the combined company would have about 36% of the national cable market, about 38% of the national broadband market, and a dominant presence in 92% of the top 25 designated market areas ("DMAs").²⁷

The combination of the two largest cable companies will create the largest MVPD in the U.S. – a company that dwarfs all other cable companies and that is 50 times larger than RCN and Grande combined and will directly compete with 80% of the customer base of RCN and Grande. This combination will not translate into public interest benefits for consumers, if competition is not also present.

MVPD competition, in any given geographic market in which Comcast and TWC operate, comes only from the DBS providers and a BSP, if there is one. Such limited competition is a direct result of the large cable providers tacitly dividing the national market into a series of

 $^{^{\}underline{24}}$ See Application of Echostar Communications Corp., 17 FCC Rcd 20559, 20614 \P 133 (2002) ("Echostar").

 $[\]frac{25}{2}$ Application at 8-9.

 $[\]frac{26}{}$ *Id.* at p. 14.

geographic clusters, wherein the incumbent retains a local monopoly or near-monopoly on cable service. It is also a result of Comcast and TWC solidifying their market area dominance by dividing the Adelphia Communications assets and executing swaps corresponding to each company's major markets.²⁸

Comcast and TWC currently have market power for video and broadband services in numerous local geographic markets. ²⁹ The increased size of the combined company will certainly extend its dominance and its ability and incentive to act so as to constrain or eliminate competition. For example, several cable companies, including Comcast and TWC, were charged with restraining competition with Verizon – the 6th largest MVPD at the end of 2012³⁰ – by coordinating to offer Verizon's wireless services as part of a "quad play" in return for not partnering with a competing wireless company. ³¹ By both decreasing the number of MVPDs in the marketplace and simultaneously increasing the market power of the largest players, the proposed transaction will increase the ability of the combined entity to use its market power to coordinate with others to restrain competition in this highly concentrated market.

The Commission can protect competition in the MVPD market only if it constrains the power of providers with national market power to eliminate smaller, local competitors through

²⁷ See Diana L. Moss, Rolling Up Video Distribution in the U.S.: Why the Comcast-Time Warner Cable Merger Should Be Blocked, American Antitrust Institute, White Paper, at p. 3 (June 11, 2014) ("Moss White Paper").

 $[\]frac{28}{}$ *Id.* at p. 6.

²⁹ See Allen Grunes and Maurice Stucke, *Crossing the Rubicon: Why the Comcast/Time Warner Merger Should Be Blocked*, Global Competition Review (Feb. 25, 2014) ("Grunes and Stucke").

³⁰ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifteenth Report, 28 FCC Rcd 10496, 10556 at Table 7 (2013) ("Fifteenth Video Competition Report").

 $[\]frac{31}{2}$ See Grunes and Stucke.

their control of "must have" programming as well as their exercise of monopsony purchasing power. As discussed herein, harm to competition and consumers will result in several areas unless the Commission denies the combination, or at a minimum, requires necessary safeguard conditions.

B. The Merger Poses Substantial Risk that Comcast Will Be Able to Use its Power in the Programming Market to Harm Competition

1. Relevant Market Analysis

The Commission's competitive analysis examines the proposed merger's impact on competition in relevant markets, identifying distinct product and geographic markets applicable to the transaction. 32 Identifying the relevant markets allows the Commission to assess "the impact of the transactions on market participants and potential entrants" and determine whether the transactions "reduce the availability of substitute choices" for consumers."33

In previous merger reviews, the Commission has defined the relevant product market "as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a 'small but significant and nontransitory' increase in price." ³⁴ The Commission conducts its product market analysis "from the perspective of customer demand," ³⁵ recognizing that "competition depends on consumers having choices between products that are fairly good substitutes for each other." ³⁶ In markets where such

 $[\]frac{32}{2}$ Adelphia Order, 21 FCC Rcd at 8234 ¶¶ 59-60.

 $[\]frac{33}{}$ *Id*.

 $[\]frac{34}{}$ SBC/AT&T Merger Order, 20 FCC Rcd at 18304,¶ 21 n.83 (citing Horizontal Merger Guidelines, §§ 1.11, 1.12); see also Echostar, 17 FCC Rcd at 20605-6, ¶ 106).

 $[\]frac{35}{2}$ SBC/AT&T Merger Order, 20 FCC Rcd at 18336 ¶ 83.

 $[\]frac{36}{2}$ Echostar, 17 FCC Rcd at 20603 ¶ 97.

choices exist, "a single provider cannot raise its prices above a competitive level because consumers will switch to a substitute." 37

Under these principles, a specific service or specific set of services represents a distinct product market if a hypothetical monopoly provider of those specific services could profitably sustain a non-transient, nontrivial price increase — that is, if the monopolist's profits after the price increase would exceed the monopolist's profits before the price increase. ³⁸ If the price increase would cause enough buyers to shift their purchases to a second product to render the increase unprofitable, then the second product should be considered to be part of the same product market. Moreover, absent a quantitative determination of whether two services are part of the same product market, courts have generally included products in the same market if they are "reasonably interchangeable" in their use. ³⁹ Thus, where "one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market."

The primary product market at issue in the proposed transaction is MVPD service, particularly when bundled with broadband Internet access. $\frac{41}{2}$ The Commission has, in past merger reviews in the video market, examined both the video distribution market and the video programming market. $\frac{42}{2}$

 $[\]frac{37}{4}$ Id

³⁸ Horizontal Merger Guidelines, at 20,572 § 1.0 (defining the relevant product market as "a product or group of products such that a hypothetical profit maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price").

³⁹ Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

⁴⁰ Echostar, 17 FCC Rcd at 20606 ¶ 106.

 $[\]frac{41}{2}$ Adelphia Order, 21 FCC Rcd at 8234 ¶ 60.

 $[\]frac{42}{}$ *Id.*; Applications at p. 130.

a. Video Distribution

(1) Product Market

In prior merger reviews involving MVPDs, the Commission concluded that the MVPD product market includes cable operators (such as Comcast, Charter and TWC); DBS operators (such as Dish and DIRECTV) wireline telephone companies (such as AT&T's U-Verse and Verizon's FiOS) and overbuilders (such as RCN, Grande and Google Fiber). In these decisions the Commission has rejected the argument that DBS and cable are not part of the same market. ⁴³ But this analysis is no longer appropriate.

Today, there is relatively little market for stand-alone video service. Instead, the product market on which the Commission should focus is the bundle of video and broadband Internet access. According to AT&T, approximately 78% of basic cable subscribers take another service, typically broadband, in a bundle with cable. 44 Currently, as AT&T acknowledges, satellite providers do not compete in this market because they lack their own broadband offering. 45 This is consistent with the Joint Commenters' experience. Approximately 85 percent of RCN's customers subscribe to a bundle that includes both video and broadband. In Grande's markets, approximately 77% of its customers purchase bundles of video and broadband. At this point, the Joint Commenters focus chiefly on selling video/broadband bundles, rather than selling standalone video.

 $[\]frac{43}{6}$ Adelphia Order, 21 FCC Rcd at 8235 ¶ 62.

⁴⁴ Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, ("AT&T/DirecTV Application"), (filed June 11, 2014); Declaration of Patrick T. Doyle, at ¶ 16 (AT&T Doyle Decl.).

⁴⁵ Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, DA 14-1129, (filed June 11, 2014); Declaration of Lori M. Lee, at ¶ 22 (AT&T Lee Decl.)

Because DBS providers do not offer broadband bundles, they are, for the most part, not competing in the same market. $\frac{46}{}$

(2) Geographic market

The Commission has conducted its competitive analysis of the video market using local markets. $\frac{47}{1}$ The Applicants do not challenge the Commission's use of local markets for its analysis. $\frac{48}{1}$

b. Video Programming

The Commission has long distinguished between various types of video programming networks, generally recognizing a distinction between national and regional cable programming. $\frac{49}{}$

Generally, cable programming networks sell packages of programming to MVPDs, which in turn pay license fees based on the MVPD's number of subscribers. These license fees are typically subject to some negotiation, with programmers providing discounts based on the MVPD's number of subscribers.

2. Vertical Public Interest Harms

Comcast, in addition to being an MVPD for nearly a third of the cable subscribers in the country, also owns substantial and popular national and local cable programming networks. It is

⁴⁶ The market for services to multiple dwelling units ("MDUs") is an exception, because an MDU can purchase video from a DBS provider and acquire broadband separately by contracting with a CLEC or competitive fiber provider in those locations where such providers have deployed fiber at or near the MDU.

 $[\]frac{47}{2}$ Adelphia Order, 21 FCC Rcd at 8235 ¶ 64.

 $[\]frac{48}{}$ Application at p. 132.

 $[\]frac{49}{2}$ Adelphia Order, 21 FCC Rcd at 8237 ¶ 67.

 $[\]frac{50}{}$ *Id.* at 8236 ¶ 65.

 $[\]frac{51}{}$ *Id*.

well established that the proposed merger would enhance the ability of the merged Comcast/NBCU/TWC to "engage in potentially exclusionary conduct" against rival MVPDs, including "frustrating or cutting off TWC's video distributions rivals' access to important Comcast-NBCU programming." In previous cable mergers, the Commission recognized that the vertical integration of Comcast's programming assets with additional outlets for distribution (such as, in this case, TWC's cable systems) would increase the likelihood of "various forms of vertical foreclosure and anticompetitive pricing" that can harm competition in the "MVPD and programming supply markets" and ultimately harm the public interest. In the *Comcast/NBCU Order*, the Commission found that Comcast could use its "control over video programming to harm competing MVPDs by withholding content or raising programming prices." The Commission has recognized that by using this power, an MVPD can use anticompetitive practices to raise its rivals' costs or induce subscribers to switch to Comcast's MVPD service. St

The Applicants contend this issue is not "merger-specific" because the bulk of Comcast's programming was acquired in the NBCU transaction and potential harms were addressed in that order. They further claim that the addition of TWC's 8 million MVPD customers "is simply not sufficient to require reopening of that analysis." This is not correct for markets where TWC is the dominant MVPD provider. Indeed the "paring of Comcast-NBCU content with TWC distribution" is significant. The combination of Comcast's programming assets with TWC's

 $[\]frac{52}{1}$ Moss White Paper at p. 11.

⁵³ *Adelphia Order*, 21 FCC Rcd at 8256 ¶ 115.

 $[\]frac{54}{}$ Comcast/NBCU Order at 4250 ¶ 28.

 $[\]frac{55}{}$ *Id.* at 4272-73 ¶ 86.

Application at p. 165.

 $[\]frac{57}{}$ Id

 $[\]frac{58}{1}$ Moss White Paper at p. 11.

stranglehold on the MVPD market presents a new merger-specific vertical harm that the Commission must address in each and every TWC geographic market. As the staff of the New York Public Service Commission explained, the "vertical market power concerns associated" with the Comcast/NBCU transaction "would now be magnified as the Comcast video footprint is expanded to include the Time Warner service areas." ⁵⁹

The addition of Comcast's NBCU programming network provides an even greater opportunity for the combined Comcast/TWC to discriminate against unaffiliated competing MVPDs such as Grande and RCN. "Foreclosing video distribution rivals would make it more difficult for them to compete with the merged company." The fact that in order to compete, Grande, RCN, and other cable overbuilders require reasonably priced access to "must have" NBC Universal programming such as NBC Broadcast, Regional Sports Networks ("RSNs"), NBC Sports Network, USA, E!, NBC Golf, Syfy, MSNBC, CNBC, Oxygen, Sprout, and Telemundo gives the merged Comcast/TWC/NBCU for the first time a significant incentive to discriminate against RCN and Grande to the benefit of the TWC MVPD affiliates with whom RCN, Grande, and other cable overbuilders compete.

The Applicants again seek to minimize the potential public interest harms. The Rosston-Topper Declaration claims that simply because MVPDs have not submitted program access disputes since the Comcast/NBCU merger, there are no potential public interest harms. The Joint Commenters contend it would be a dereliction of the Commission's duty under the Communications Act to accept such claims without further investigation. The combination of

 $[\]frac{59}{}$ NYS DPS Comments at p. 36.

⁶⁰ Moss White Paper at p. 13.

⁶¹ Application of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement; Declaration of Dr. Gregory L. Rosston and Dr. Michael D. Topper ("Rosston-Topper Decl.") at ¶ 234.

Comcast's NBCU programming with TWC changes the competitive conditions in the marketplace in legacy TWC markets and creates an incentive for Comcast to act in an anti-competitive way that would not exist absent a merger between Comcast and TWC. Thus, the merger poses a potential threat to competition in a host of geographic markets that is specific to the merger.

Access to programming is a cable operator's lifeblood. No cable company can succeed in a competitive market without the ability to offer the programming desired by customers. RCN has previously told the Commission about its difficulties in obtaining access to essential "must have" programming such as regional sports and news programming from incumbent cable providers including Comcast and TWC. ⁶² It is imperative that access to programming by competing providers not be impaired as a result of Comcast and TWC combination.

In addition, Comcast/NBCU has adopted a programming acquisition floor that requires each MVPD, in order to obtain certain must-have programming (including RSNs, NBC Sports Network, USA, Syfy, MSNBC, Bravo and CNBC), to ensure ***BEGIN HIGHLY

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CONFIDENTIAL ***. In effect, this requires MVPDs to change the way cable packages are sold, no longer selling based on consumer demand but rather forcing customers to take higher levels of video services.. This particularly impairs RCN's and Grande's ability to serve an ever-

⁶² See e.g., Comments of RCN Telecom Services, Inc. to Adelphia Communications Corporation Applications for Consent to the Assignment and/or Transfer of Control of Licenses, MB Docket No. 05-192 at p. 11-14 (filed Jul. 21, 2005) (describing problems accessing PBS Kids programming and Mid-Atlantic Sports Network); See Petition of RCN Telecom Services, Inc. to Deny, Comcast Corporation and AT&T Corporation Applications or Condition Consent, MB Docket No. 02-70 at p. 19-21, 28 (filed Apr. 29, 2002) (describing problems accessing regional sports networks and the Greek channel) ("RCN 2002 Petition").

increasing customer base that chooses to subscribe to a "broadcast-level" of video service paired with a robust broadband Internet connection. This level of service currently caters to a lower-income demographic and those who simply cannot afford a full bundle of expanded video channels.

This anti-competitive practice has the effect of raising the costs of rival MVPDs by forcing them to sell less popular packages of video service, even if their own business judgment would be to sell more of a variety of programming packages that consumers want. And this harm is related to the merger since Comcast has a greater incentive to *** BEGIN HIGHLY CONFIDENTIAL END HIGHLY CONFIDENTIAL *** MVPDs with whom it competes or will compete directly by virtue of adding TWC to its portfolio of MVPDs. The addition of TWC's footprint expands the number of Comcast controlled MVPD subscribers that can potentially select another MVPD and thus increases the likelihood that Comcast/NBCU will continue or expand **BEGIN HIGHLY** CONFIDENTIAL **END HIGHLY CONFIDENTIAL** *** to the detriment of competing MVPDs.

3. Horizontal Public Interest Harms

a. Harms Arising from Comcast's Expanded Footprint

The Applicants have publicly defended the proposed merger on the grounds that Comcast and TWC do not directly compete in any market. 63 While that may be true, there are numerous other ways the proposed transaction can harm competition. As described above there are numerous vertical harms associated with Comcast's control of must-have programming. And

 $^{^{63}}$ Letter from Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, at p. 2 (Aug. 13, 2014) (claiming that "Comcast and TWC serve almost entirely distinct geographic areas and do not compete in any relevant market.").

there are also numerous programming harms associated with Comcast's ability to command significant discounts for programming far in excess of what smaller rivals receive. There are also harmful effects from the expansion of Comcast's footprint to include TWC's territories despite the fact that they do not compete for MVPD customers. With its "larger footprint, the merged firm would likely recapture more of the benefits of foreclosing rival MVPDs and OVDs than Comcast-NBCU would before the merger, thus enhancing the merged firm's incentive to potentially engage in market foreclosure." 64 In particular, the TWC acquisition gives rise to additional incentives for Comcast to weaken competitive MVPDs. Typically, one incumbent's exclusionary behavior towards competitors can benefit not only that incumbent but also other incumbents with whom that competitor competes. 65 In other words, pre-merger, Comcast's exclusionary conduct towards RCN, for example, in Philadelphia and Washington, DC also benefitted pre-merger TWC in its competition with RCN in New York. 66 Prior to the merger it would be unlikely that Comcast would model its behavior towards RCN with any consideration of the impact on TWC's competitive interest towards RCN.67 As a combined entity, however, Comcast's incentive to raise RCN's costs is increased because of the additional benefit it can capture with regard to RCN's competition with Comcast's TWC operations in New York. $\frac{68}{100}$

Further, "Comcast's acquisition of local monopolies affects the overall competitive

 $[\]frac{64}{}$ Moss White Paper at p. 13.

⁶⁵ See Declaration of Michael L. Katz and Steven Salop, *Using a Big Footprint to Step on Competition: Exclusionary Behavior and the SBC-Ameritech Merger*, Attachment C to Sprint Petition to Deny, CC Dkt. No. 98-141 ¶ 62 (filed Oct. 15, 1998). ("Katz-Salop SBC-Ameritech Decl.")

⁶⁶ *Id*.

 $[\]stackrel{\text{d}}{=}$ Id.

 $[\]frac{68}{}$ *Id*.

landscape." Because many of Comcast's MVPD rivals "compete throughout the US, and if Comcast can disadvantage its rivals by raising their costs, then consumers can be adversely affected far beyond Comcast's local cable monopolies." In addition, the combined Comcast and TWC would have the incentive to "search for new methods to exclude competitors and intensify their exclusionary conduct."

The Commission adopted this theory in its analysis of competitive harms flowing from the merger between SBC and Ameritech in 1999. The particular, the Commission found that despite the fact that SBC and Ameritech did not compete in any local market, the "merger increases, from pre-existing substantial levels, the ability and incentive of the merged entity to discriminate" because "post-merger, the combined entity would internalize external effects ... thus increasing its incentive to ... weaken a competitive service in one region, [because] this weakens it in other regions as well." This plainly applies here as Comcast's acquisition of TWC's markets provides it with an increased incentive to adopt exclusionary practices against competitors, such as RCN and Grande, who compete in both legacy Comcast and TWC markets.

b. Competitive Harms in the Programming Market

⁶⁹ Grunes and Stucke, at p. 1.

 $[\]frac{70}{}$ *Id*.

 $[\]frac{71}{2}$ See e.g., Katz and Salop SBC-Ameritech Decl. ¶ 63.

⁷² Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, 14 FCC Rcd 14712, 14804 ¶ 207 (1999); see also, Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14128 ¶ 205 (2002) ("Bell Atlantic/GTE Order").

 $[\]frac{73}{}$ *Id*.

The addition of approximately 8 million subscribers through the TWC acquisition and associated transactions will invest the combined company with significant additional buying power in the market for video programming. The aggregation of this buying power in a single entity creates monopsony power — "a buyer's monopoly." "Emerging academic scholarship suggests that monopsony power can occur at lower market shares than monopoly power" and as a result the proposed transaction "increases Comcast's power to …raise the costs of Comcast's rivals."

With its monopsony power in programming acquisition unchecked, the combined company would have a natural incentive to use its reduction in costs to engage in predatory conduct by reducing its prices in markets where it faces competition in order to drive its competitors out of the market, while maintaining prices (and thereby increasing profits) in markets where it faces little or no competition. Once competition has been eliminated or neutralized, the combined company is then free to raise prices without fear of losing subscribers to competitors. The continued existence of smaller providers is the only thing that forces dominant providers such as Comcast and TWC to charge below-monopoly prices, and this is in the public interest. Because cable and broadband delivery involve huge sunk costs, if other small providers are driven out of the market, others cannot and will not enter to replace them.

Comcast already enjoys very significant discounts on video programming when obtaining programming from unaffiliated content providers. Smaller competitors, such as the Joint Commenters, pay significantly more for the same programming. Even large companies such as AT&T pay far more than Comcast for the same programming. AT&T has recently admitted that

⁷⁴ See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 320, (2007).

⁷⁵ See Grunes and Stucke.

with nearly 6 million video subscribers it could not compete with Comcast, stating that "U-verse video service lacks, and cannot achieve, the critical scale and value necessary for AT&T to negotiate for programming at costs that are competitive with ... Comcast and T[WC]." AT&T states that its "content costs per subscriber are significantly higher" than those of either Comcast or TWC.

Based on the many years of experience of their management in this industry, the Joint Commenters agree with AT&T's assertions that program acquisition costs are heavily dependent on the size of purchaser. The enormous discounts that large purchasers receive are not based on differences in cost or increased efficiency. Rather, they result from the pure exercise of monopsony power.

AT&T states that programming costs account for a very large percentage of its variable recurring cost and video revenues. The Programming accounts for ***BEGIN HIGHLY CONFIDENTIAL

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HIGHLY CONFIDENTIAL*** For Grande, programming accounts for ***BEGIN HIGHLY CONFIDENTIAL

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HIGHLY CONFIDENTIAL*** Both RCN and Grande have far fewer subscribers than AT&T and are thus at even greater risk of anti-competitive pricing by Comcast.

⁷⁶ AT&T DirecTV Application, pp. 23-24.

 $[\]frac{77}{10}$ Id. at p. 22, AT&T Lee Decl. ¶ 20. Comcast notes that its programming costs have increased by 54 percent over the last five years. Application, p. 149. Comcast/TWC's "larger combined scale and scope should," however, "strengthen its hand in negotiations with content providers and cause the combined company's per-subscriber content costs to increase more slowly, if not decrease." AT&T Lee Decl. ¶ 20.

 $[\]frac{78}{}$ *Id.*

While Comcast notes that its programming costs have increased by 54 percent over the last five years, ⁷⁹ that says nothing about the cost advantages that Comcast achieves over smaller rivals. Comcast will handle programming purchases for the combined entity and for Bright House Networks, in which TWC owns an interest. ⁸⁰ Comcast/TWC's larger combined scale and scope will certainly strengthen its hand in negotiations with content providers and cause the combined company's per-subscriber content costs to increase more slowly, if not decrease. ⁸¹

Based on AT&T's assertion that it is too small to compete effectively with Comcast or TWC in the broadband/video bundle market, in the geographic markets where RCN or Grande compete with Comcast/TWC and AT&T (Chicago, San Antonio, Dallas, Waco, Corpus Christi, and Austin/San Marcos), there is currently no competitive offering sufficient to compete effectively with the merged Comcast/TWC. If a well-funded company with a large subscriber base and significant network assets such as AT&T cannot compete with Comcast/TWC today, then the public interest is in jeopardy, and should not be further jeopardized by allowing Comcast to increase its monopsony power through the acquisition of approximately eight million additional subscribers.

Similar reasoning suggests that Verizon, which has fewer video customers than AT&T,⁸² also lacks the scale to provide effective video competition to the merged Comcast/TWC in the markets that overlap with RCN — New York, Philadelphia, Washington, and Boston.

 $[\]frac{79}{}$ Application at p. 149.

⁸⁰ See Ex Parte Letter of Katheryn A. Zachem, Comcast Corporation, et al. to Marlene Dortch, MB Docket 14-57, p. 10-11(filed June 24, 2014).

⁸¹ AT&T Lee Decl. ¶ 20.

 $[\]frac{82}{100}$ As of its Second Quarter 10-Q, Verizon had 5.4 million FiOS video subscribers. *Id* at p. 33.

Comcast states that there should be no competitive concerns regarding its buying power in the market for video programming. But Comcast's reply to critics of the merger who raise monopsony power concerns responds on the wrong issue. Comcast's Rosston-Topper Declaration, for example, addresses the possibility that the merged Comcast/TWC would use its monopsony power to "deny carriage to non-affiliated programming." This is not the Joint Commenters' primary, concern, nor does it appear to be the concern of other MVPDs that compete with Comcast, such as AT&T.

Instead, as explained herein, the Joint Commenters' concern is that by virtue of its ability to use its monopsony power to command significant and discriminatory discounts — especially discounts that have no economic rationale in that they are based not on efficiency but on market power — the merged Comcast/TWC can selectively reduce prices in order to drive competition out of the market.

Comcast's current behavior indicates that it prices most aggressively in markets where it faces a wireline based competitor such as a telephone company or overbuilder. Est It is only in such markets where Comcast faces competition that it offers cost effective low-end packages that include broadcast stations and a few select desirable cable channels. In other markets subject to less competition, Comcast forces consumers to subscribe to wider packages of channels at much higher prices. Post-merger, after obtaining even larger programming discounts as the result of increased power in the market for purchase of programming, the combined Comcast will inevitably selectively pass on its cost savings in the short run through predatory pricing tactics to

⁸³ See Application, Rosston-Topper Decl. ¶ 174.

 $[\]frac{84}{}$ *Id.* at ¶ 175.

^{85 2004} GAO Report at Figure 4, p. 16.

drive out competition in competitive markets and then raise rates everywhere as competition recedes.

Even if predatory pricing were not a concern, Comcast's monopsony power creates additional potential public interest harms. For example, being forced to provide Comcast additional discounts on top of their already significant discounts "will force programmers to extract even higher rates from smaller pay-TV providers ... in order to compensate the programmers for lost revenue."86 Comcast's application suggests this concern is invalid. The Rosston-Topper Declaration states that if Comcast pays less "there is no fundamental reason that other [MVPDs] would or could be charged more."87 But the natural incentive of every company is to maximize profit. If programmers must increase the discount they provide Comcast, it is only natural that they look for places to recoup all or part of their money such as from MVPDs that lack the bargaining clout accumulated by the merged Comcast/TWC. And even if program providers can foresee that increasing the pricing gap between Comcast/TWC and smaller competitors may not be in their collective long-term interest, each program provider, unable to act collectively with other program providers, will see it in its own individual interest to extract the maximum it can from each MVPD, thus making smaller providers even less competitive in pricing retail services.

4. Broadband Internet Access Market

The Commission has recognized that residential "high-speed Internet access services" is a relevant product market. 88 Similar to the Commission's analysis of MVPD service, the

⁸⁶ Letter from Jeffrey H. Blum, DISH Network Corporation to Marlene H. Dortch, Secretary, FCC at p. 2 (Aug. 1, 2014).

⁸⁷ Rosston-Topper Decl. ¶ 198.

⁸⁸ Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors to AT&T Comcast Corp., Transferee, Memorandum Opinion and

geographic market is local since a "customer's choice of broadband Internet access provider is limited to those companies that offer High-speed Internet access services in his or her area." The Applicants do not contest either the product or geographic market definition. 90

Comcast's significant market power in the broadband Internet access market poses several public interest harms. First, Comcast/TWC will gain significant market influence for wired broadband equipment – both for use in the core network as well as in the home. The combined power of TWC's local dominance and Comcast's national presence will allow the combined Comcast/TWC to enter into exclusive arrangements with content, software and hardware providers thereby restricting the Joint Commenters' ability to obtain access to critical content and equipment needed to effectively compete.

In addition, Comcast/TWC's dominant position in local broadband markets combined with Comcast's national footprint could also allow the combined entity to expand current and form new exclusive contracts with installation and construction contractors. This would impede Joint Commenters and other overbuilders in their efforts to timely expand their fiber optic networks and delay their customer installations. Lastly, the combined entity, given its size and power as a broadband ISP, will have an increased ability to monetize its network by charging ISP content providers to access its subscribers, creating a source of revenue that smaller competitors cannot obtain. 91

Order, 17 FCC Rcd 23246, 23295-96 ¶ 128 (2002) *aff'd sub nom. Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009 (D.C. Cir. 2003) ("*Comcast/AT&T Broadband Order*").

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⁹⁰ Application at p. 135.

⁹¹ See Comments of Level 3, Protecting and Promoting the Open Internet, GN Docket No. 14-28, Framework for Broadband Internet Services, GN Docket No. 10-127, pp. 7-10 (filed March 21, 2014); Comments of Netflix, Protecting and Promoting the Open Internet, GN Docket No. 14-28, Framework for Broadband Internet Services, GN Docket No. 10-127, pp. 12-

C. The Merger Poses Substantial Risk that Comcast Will Be Able to Use its Power in the Cable Advertising Market to Harm Competition

The combined entity may deny RCN, Grande and their vendors' access to the Comcast and TWC major market advertising sales cooperatives. Viamedia, the nation's largest independent Spot Cable Advertising representative of MVPDs, has raised significant concerns to the New York State Public Service Commission ("NYPSC") about the anti-competitive effects the combined company will have on advertising nationwide and specifically in New York City. 92 RCN and Grande share several of those concerns.

By way of background, RCN and Grande, like most overbuilders, outsource spot cable advertising representation Services to an independent firm, which is a service required by MVPDs to sell, bill for, and insert spot advertisements into two to three minutes an hour of programming. Advertising is sold as (a) national spots through National Cable Communications ("NCC"), (b) regional spots by DMA through a consortium known as an Interconnect that is controlled by the dominant MVPD in the DMA, and (c) local spots directly through a given MVPD or its spot cable advertising representation firm. Comcast and TWC do not use an independent firm but have spot cable advertising representation divisions, which are the largest and second largest representation companies.⁹³ In addition, Comcast and TWC together own 80% of NCC and control 72% of the top 25 Interconnects nationwide.⁹⁴

16 (filed July 15, 2014); Comments of Cogent Communications Group, Inc., *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, *Framework for Broadband Internet Services*, GN Docket No. 10-127, pp. 19-22(filed July 15, 2014.

 $[\]frac{92}{2}$ See Viamedia, Inc. Comments, NYPSC Case 14-M-0183 (filed Aug. 8, 2014) ("Viamedia Comments").

 $[\]frac{93}{}$ *Id.* at p. 1.

 $[\]frac{94}{}$ *Id.* at p. 2.

Comcast's and TWC's current practice in markets where they compete with RCN is to prohibit RCN (or its spot cable advertising representative) into the advertising Interconnect. An exception exists in New York because there are two competing Interconnects, one (New York Interconnect) controlled by Comcast and Cablevision and another (Time Warner/Full Zone, NY) managed by TWC, in which Verizon and RCN also participate. If the merger is allowed to proceed and Comcast and TWC consolidate their advertising operations as planned,95 RCN will be excluded from the remaining advertising Interconnect in New York, as it has been in all other Comcast-controlled Interconnects in markets where there is only one Interconnect, $\frac{96}{2}$ competition will be reduced and the result would be increased prices for advertisers and ultimately consumers. Comcast and TWC compete in the spot cable advertising representation market, particularly in New York, and the reduction of competition will give the combined entity the ability to increase prices to advertisers. 97 Prices for advertisers could be increased because advertisers' ability to leverage independent Interconnects against the Interconnects controlled by the combined entity will be severely depleted given the substantial footprint of the combined entity's Interconnects. In short, any multi-regional or national advertiser will need to go through the combined entity if it wants to buy spot cable advertising. This could also lead to the combined entity deciding to pass along less advertising revenue from the NCC and its controlled Interconnects to its rivals, forcing smaller MVPDs to consider an increase to subscriber fees or a decrease in promotional efforts to compensate for the loss in advertising revenue. In New York specifically, advertisers

 $[\]frac{95}{}$ Application at n. 257.

⁹⁶ Even if Comcast were to reverse this policy in New York, the elimination of the competition that currently exists between the two New York Interconnects may be expected to result in Comcast imposing a shring arrangement on RCN that is less favorable than the one that exists today.

⁹⁷ Viamedia Comments at 2.

will be deprived of the benefit of competing advertising Interconnects, likely leading to higher prices for advertising which those advertisers will likely pass along to consumers of their goods and services.

Further, the combined entity will increase its power to control the companies that are able to provide spot cable advertising representation services. Comcast has already demonstrated a willingness to exclude Viamedia and its MVPD partners from certain Interconnects and has threatened Viamedia's access to the NCC. 98 By increasing the number of Interconnects under its control. The combined entity would have even greater power to exclude competitors from the NCC and the Interconnects. Such a result will further reduce competition and increase the ability of the combined entity to increase advertising prices, and may result in an overbuilder being forced to contract with the combined entity for spot cable advertising representation services. This would be detrimental because an overbuilder would have to share sensitive business information about its cable services with the combined entity to obtain the necessary spot advertising, reducing its ability to compete with the combined entity. Further, the control of both advertising interconnects in New York would allow the combined Comcast/TWC to artificially raise RCN's costs by depriving it of access to advertisers, thereby reducing RCN's ability to use advertising revenue to offset other costs of providing broadband/video bundles. The loss of advertising revenue requires RCN to recoup that revenue from directly from subscribers, thereby making RCN's services less competitive with Comcast/TWC's and harming the public's interest in maintaining competitive choices for video and broadband bundles.

 $[\]frac{98}{}$ *Id.* at 6.

D. The Merger Poses Substantial Risk to Vendor and Contractor Access

Incumbent MVPDs, such as Comcast and TWC, often require local and national sales, installation, construction and field collections contractors to enter into exclusive contracts by including "non-compete" clauses. RCN has made the Commission aware of obstructions it previously encountered in obtaining access to third-party contractors in the Philadelphia and Washington, DC markets. ⁹⁹ To summarize, Comcast required contractors to sign non-compete clauses barring the contractor from working for any competing cable operator in the same jurisdiction and aggressively enforced these clauses, resulting in contractors declining to work for RCN or demanding higher prices from RCN as well as delays and construction setbacks with accompanying expenses.

The combined entity will have increased power to utilize exclusive contracts to deny RCN, Grande and other small competitors' access to local and national sales, installation, construction and field collections contractors. The size of the combined entity will make it more difficult for competitive providers to locate contactors that are not subject to exclusive contracts in the same markets as Comcast and TWC. This anti-competitive tactic of requiring exclusive contracts will only grow worse when the combined entity can act concertedly across multiple jurisdictions. It will become more difficult for overbuilders to engage contractors since they will likely not be able to offer the same lucrative contracts that the combined company will be able to offer, given its extended footprint.

E. The Merger Poses Substantial Risk to Industry Technology Access

The combined entity, by means of scale and buying power, may restrict Joint Commenters from obtaining access to emerging technology equipment, such as DOCSIS 3.1 and

⁹⁹ See Petition of RCN Telecom Services, Inc. to Deny Applications or Condition Consent, MB Docket No. 02-70 at p. 16-19 (filed Apr. 29, 2002).

TV Everywhere-intensive offerings. This concern is very real, given the limited number of manufacturers of video customer premises equipment, cable modem termination systems ("CMTS") and broadband gear. A dominant MVPD could easily demand that one manufacturer give it the first, or even exclusive, rights to a critical emerging technology by threatening to take its business to another manufacturer – perhaps the only other manufacturer of the technology. This buying power has the potential to delay competitive MVPDs from deploying the emerging technology or cause much higher cost for the technology to competitive MVPDs as a result of a limited supply being available.

Even worse, competitors could effectively be "locked out" of the market for new technologies if the combined entity is able to negotiate exclusive arrangements for emerging technologies. Comcast and TWC have exerted their market power in the past to impede competitors' efforts to negotiate acceptable contracts for the deployment of emerging technology. RCN previously told the Commission about TWC's negotiation of exclusive non-compete clauses in contracts with Video On Demand ("VOD") vendors that prevented RCN from deploying the technology in any market in which TWC operates. ¹⁰⁰ RCN also told the Commission about it inability to license a TV electronic programming guide product because the supplier had entered into exclusive contracts with its financial partners including Comcast. ¹⁰¹ Should a lock-out happen today, overbuilders could be driven out of the market if they cannot satisfy consumer demand for the latest technology and services.

V. Remedies

An unconstrained merger between Comcast and TWC constitutes a major threat to the continued beneficial existence of smaller MVPDs that are the source of competition in the

 $[\]frac{100}{100}$ *Id.* at p. 30-33.

market for bundled video and broadband, and is therefore contrary to the public interest. In order to prevent the public interest harms associated with the combination of Comcast and TWC, the Commission should deny the Applications. While the Applicants offer several proposed conditions in an effort to convince regulators to approve the merger, such conditions are rarely effective. It is axiomatic that "prohibiting certain actions by the [merged] firm does not negate [its] incentive to pursue profit nor the firm's interest in circumventing" the conditions. ¹⁰² In many cases, the merged entity will "develop workarounds to exploit loopholes in the remedies." ¹⁰³ Thus, the preferred remedy is to deny the Applications.

If, however, the Commission elects to grant the Applications subject to conditions, the Joint Commenters urge the Commission to impose the following conditions to offset harms to competition and consumers.

A. Extend Comcast/NBCU Programming Conditions to TWC Properties and Eliminate Loopholes

Comcast and TWC have agreed to extend the commitments and obligations in the *Comcast-NBCU Order* to the TWC systems. 104 Joint Commenters urge the Commission to extend the *Comcast/NBCU Order* programming conditions to the TWC systems, while closing loopholes in those conditions, and to lengthen the duration of these requirements to 10 years after the merger closing, and no less than seven years. A 10-year term is imperative given the size and market power of the combined company.

¹⁰¹ *Id.*

¹⁰² Moss White Paper at p. 18.

 $[\]frac{103}{1}$ *Id*.

 $[\]frac{104}{100}$ Application at p. 106-110.

¹⁰⁵ See Comcast/NBCU Order, 26 FCC Rcd at 4355, Appendix A.

In particular, the Commission should modify the program access condition, which has proven to be of little value. Under the *Comcast/NBCU Order*, MVPDs may submit disputes "with Comcast-NBCU over the terms and conditions of carriage of Comcast-NBCU affiliated programming to commercial arbitration." Comcast asserts that the fact that no programmers have sought arbitration indicates that there is no problem with the terms of its programming offers. 107

In reality this merger condition is flawed. Small MVPDs still face significant barriers in their ability to negotiate reasonable programming arrangements with Comcast/NBCU. In particular the lack of information available to MVPDs regarding current terms and pricing available to similarly situated MVPDs and the costs of acquiring content, in particular, make it difficult if not impossible for smaller MVPDs to assess the likely outcome of arbitration. Coupled with the significant costs of pursuing arbitration, it is difficult for smaller MVPDs to negotiate effectively with Comcast and convey a credible threat of arbitration. The Commission should, while extending the program access conditions in the *Comcast/NBCU Order*, adopt revised conditions, outlined below, that make the arbitration process more accessible.

One revision is for the Commission to clarify that the program access condition prohibits

Comcast/TWC from imposing ***BEGIN HIGHLY CONFIDENTIAL

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 $[\]frac{106}{2}$ Comcast-NBCU Order, 26 FCC Rcd at 4259 ¶ 50.

¹⁰⁷ Rosston-Topper Decl. ¶ 198.

competitive MVPDs will be disadvantaged in obtaining programming that the combined entity can obtain by virtue of its size and extended footprint.

Similarly, the Commission should modify the condition regarding the use of independent parties to negotiate and arbitrate on behalf of MVPDs. . 108 The Commission should require that the combined entity allow MVPDs that use the National Cable Television Cooperative ("NCTC") for programming purchases to use NCTC for arbitration. The Commission's definition of "buying groups" currently restricts program access rule eligibility to those entities that assume full financial liability for its members, which NCTC does not. 109 Because of the number of subscribers that effectively obtain programming from NCTC, its bargaining power can help obtain more competitive pricing for its members, and because NCTC can spread the costs of arbitration among a MVPDs with a larger aggregate subscriber base, Comcast is more likely to view NCTC arbitration as a credible threat, and as a result offer more reasonable prices, terms and conditions for its programming. The Commission should therefore allow NCTC and its MVPD members to use the program access rules for Comcast/NBCU and TWC programming, without requiring NCTC to assume financial liability for its members.

Further, the Commission should modify the *Comcast/NBCU Order* condition to include the following Comcast-affiliated networks that are not currently covered by the arbitration condition but should be: MLB Network, NHL Network, PBS Kids Sprout, Retirement Living TV, Shop NBC, TV One, Weather Channel and Universal Sports. These networks are essential "must-have" programming for which no comparable substitute exists.

 $[\]frac{108}{2}$ See Comcast-NBCU Order, 26 FCC Rcd at 4262 ¶ 58.

¹⁰⁹ 47 C.F.R. §76.1000.

B. Require Comcast/TWC to Provide Access to Advertising Entities

As described above, Comcast and TWC together own 80% of the NCC, the company that handles national advertising spots, and control 72% of the top 25 Interconnects, which handle regional advertising spots. They have already shown their willingness to exclude independent spot cable advertising representation services from their controlled-Interconnects thereby raising RCN's costs and the costs to advertisers. Accordingly, the combined entity must provide competitive MVPDs, such as RCN and Grande, and their vendors with access to the Comcast and TWC major market advertising sales cooperatives on the same terms available to Comcast/TWC.

C. Prohibit Comcast/TWC From Entering Exclusive Contracts with Contractors, Vendors, and Equipment Manufacturers

Absent a condition, the combined entity will have increased power to utilize exclusive contracts to deny RCN, Grande and other small competitors' access to local and national sales, installation, construction and field collections contractors. Competitors could effectively be "locked out" of the market for new technologies if the combined entity is able to negotiate exclusive arrangements for emerging technologies or equipment. The Commission must therefore prohibit the combined entity from entering into exclusive contracts with contractors, vendors, equipment manufacturers, and product producers.

D. Require Access to Emerging Technology and Equipment

As described above, the combined entity by means of scale and buying power may restrict Joint Commenters from obtaining access to emerging technology equipment, such as DOCSIS 3.1 and TV Everywhere-intensive offerings. The Commission should require Comcast and TWC to provide competitive MVPDs with access to emerging technology and equipment on reasonable rates, terms and conditions. The Commission should also ensure that the combined

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entity does not prevent third party hardware and software providers from offering non-

discriminatory prices and terms to other competitors for emerging technology and equipment.

This condition should include a requirement allowing competitive MPVDs to participate in the

joint provision of WiFi hotspots.

VI. Conclusion

For the reasons set forth herein, Joint Commenters respectfully submit that Commission

must conclude that the proposed transaction will not serve the public interest, convenience, and

necessity and deny the Applications. Should the Commission conclude, however, that the

transaction can be approved, any such approval must be conditioned to offset harms to

competition and consumers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, M. Renee Britt, hereby certify that on this 25th day of August 2014, a redacted copy of the foregoing "RCN Telecom Services, LLC, Grande Communications Networks, LLC, and Choice Cable TV Of Puerto Rico Petition To Deny Applications Or Condition Consent" was served as noted below.

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